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Supreme Court, U.S.
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No. 10-1086

IN THE

Supreme Court of the United States

LIBERTY APPAREL COMPANY, INC., et ano.,

Petitioners,

v.

LING NAN ZHENG, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioners have presented compelling reasons to grant the Petition where the substantive issue they raise concerning determination of the existence of a joint employment relationship under the Fair Labor Standards Act ("FLSA") was settled by this Court in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947), the Second Circuit's Summary Order upholding the finding of joint employment was fully consistent with *Rutherford Food* and with the decisions of other Courts of Appeals, and Petitioners failed to present in trial or post-trial proceedings or on their appeal to the Second Circuit the issue they raise now in the Petition?

II. Whether Petitioners have presented compelling reasons to grant the Petition where the procedural issue they raise, whether the District Court erred in submitting to the jury determination of the issue of joint employment, was effectively settled by this Court's precedents and the Second Circuit's Opinion upholding submission to the jury of the joint employment determination was fully consistent with those precedents and the decisions of other Courts of Appeals?

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labor laws (and unionization). The prolonged strikes by New York City garment workers in 1909 and 1910, coupled with the infamous fire at the Triangle Shirtwaist factory in 1911, led to demands for reform of the garment industry. The New York Legislature created the Factory Investigation Committee which produced proposals for legislative reform which sought to impose responsibilities on garment manufacturers, as the employers of the workers who sewed and assembled their garments. In response, manufacturers undertook to contract out to a contractor the sewing/assembly work, in an attempt to create a process of production which might allow them to claim that they were not the employers of the workers sewing and assembling their garments and, so, did not have any responsibilities to those workers as an employer. By the 1920s, this practice had become the dominant method in the industry for sewing and assembling women's garments. (This history of outsourcing in the garment industry and the resultant conversion of most garment manufacturers into "jobbers" is well-known. *See Abeles v. Friedman*, 171 Misc. 1042, 14 N.Y.S.2d 252, 255-56 (N.Y. Sup. Ct. 1939).)

In the 1990s, as before, sewing/assembly was an integral part of garment production and still could not be accomplished without the use of manual labor. Garment remained a "cutthroat" industry, and labor costs were the most significant component of garment production. Petitioners' expert conceded that attempted evasion of labor laws (to reduce labor costs) still animated at least some garment manufacturers in the 1990s. And there was ample evidence that Petitioners did not contract out the sewing/assembly of their garments for any legitimate economic reason. First, contractors did not possess any sophisticated or expensive technology which was not

readily available to Petitioners directly. To the contrary, sewing and assembly of garments required only low-cost leasing of sewing machines and a pressing machine. Space for this phase of production was inexpensive due, in part, to New York City's creation of manufacturing zones, such as Chinatown and Sunset Park, Brooklyn, in which rents were capped specifically to attract manufacturing. Workers who sewed and assembled garments did not possess any specialized expertise or experience. Their work required minimal skill and was usually performed by immigrant women possessed of little or no formal education. Liberty's drafting of written specifications and instructions for the sewers/assemblers and the regular, extensive and direct supervision of Respondents' work by Liberty representatives, *see infra*, demonstrated that Petitioners knew well how the sewing/assembly was to be accomplished.

This was not a case where a manufacturer outsourced to a factory in an underdeveloped country or in some other region of the United States to gain access to sewers/assemblers who would work for materially lower wages than workers in the manufacturer's locale. The workers whom Petitioners used to sew/assemble their garments worked in the very same city in which Liberty's facilities were located. Moreover, in the late 1990s, there were between 4,000 and 4,500 garment contractors in New York City, which meant there were literally tens of thousands of garment workers who composed a large pool of cheap labor which was readily available to Petitioners to be hired as direct employees.

The evidence showed that Petitioners' rationale that they contracted out because of the cyclical nature of production was a pretext. Petitioners professed they did

not hire garment workers directly because they did not want to pay them for holidays or seasonal periods when there was little or no work. This ignored that Petitioners could readily do exactly what Yam did: lay off garment workers temporarily and bring them back when the next production cycle began. Virtually all of the Respondents who worked at the factory into late November or early December of a calendar year testified to being laid off temporarily in the Christmas/New Year period after production for the holiday season had crested and then being brought back by Yam in mid-January. Also readily available at the conclusion of such a down period were the tens of thousands of other garment workers in New York City who would have been essentially interchangeable with any worker who might not have returned from a temporary layoff.

Undisputed testimony established the "cutthroat" character of competition for work in the garment industry. This competition allowed Liberty effectively to control Respondents' rates of pay. It paid Yam by the piece, just as Yam paid Respondents by the piece. The evidence showed Yam possessed virtually no ability to influence the piece rates at which he was paid. Because Liberty used *30 to 40* contractors at any one time, Yam was faced with "negotiations" with Petitioners which, in essence, consisted of being told: 'Take it or leave it.' If Yam did not accept the piece rate quoted by Petitioner Nigri, Petitioners simply took the job at the quoted price to any of its dozens of other contractors. As Respondents' expert, a former wage and hour investigator for the U.S. Department of Labor who specialized in the garment industry, put it:

> [I]t is almost as if the contractor was an employee or worker looking for a job....[I]t was a one-sided negotiation thing where the jobber dictated, this is what I'll pay for this. You interested, take it. Not interested, leave it.

Each of Liberty's other contractors was under the same economic coercion. And waiting behind those contractors, likewise eager for work, were another 4,000 to 4,500 contractors.

Liberty had to meet deadlines regularly set by its retail customers on individual jobs. Liberty was so certain of its ability to quickly outsource sewing/assembly at an acceptable cost that it completed virtually all pre-factory production on a job even before the job was outsourced. Indeed, it did not even need to seek out contractors to handle jobs: contractors showed up at the Liberty office/warehouse in Brooklyn on their own initiative "on a daily basis" looking for work. In these circumstances, Liberty virtually dictated the prices it paid for its jobs.

Yam could not long survive if his costs for sewing/assembling a garment exceeded what Liberty paid him for that work. Because he was paid by Liberty by the piece on a job-by-job basis and in turn paid Respondents at piece rates for their work on a Liberty job, Yam was able to insure that the piece rates he paid in the aggregate were below the piece rate paid to him. If Liberty paid Yam $3 per piece on a job, Yam would set the piece rates he paid workers for sewing/assembling so that, in the aggregate, they would not exceed $3, regardless how many hours those workers spent performing their work on that job. The piece rate paid by Liberty on a particular garment,

effectively dictated by it, thus operated as a cap on the piece rates paid to the workers sewing/assembling that garment.

Because Respondents worked more than 85 hours per week and 70%-80% of their work was on Liberty garments, their overtime work obviously was predominantly for Liberty. This was further shown by the instances where Liberty representatives sought to induce Respondents to work beyond even their regular hours with the promise of pay for unremunerated past work if a particular Liberty job was completed immediately. More significantly, as a precondition to obtaining Liberty work, Yam was required to sign a preprinted Liberty form promising completion of each job within 7 days of delivery of materials and instructions and acknowledging he was subject to a substantial monetary penalty if he failed to meet the deadline. The short deadline coupled with the threat of penalty, Yam's incentive to take on as much work as he could obtain, arising from his being paid by the piece, and the fact that neither Yam's "profit" nor the workers' pay was impacted by the number of overtime hours worked in order to complete a job (because sewers/assemblers were not paid by the hour), ineluctably forced Yam to require Respondents to work exorbitant overtime hours as a matter of course. Occasionally, Yam's need to finish a Liberty job by an imminent deadline, in order to avoid a penalty, resulted in Respondents having to work through an entire night.

Petitioners regularly, extensively and directly supervised Respondents' work on their garments in a manner indistinguishable from the control exercised by Yam, Respondents' direct employer. Liberty

representatives roamed the factory floor freely, often alone, three or four times per week, often for hours at a time. They literally stood over Respondents' shoulders at their individual work stations, watching them sew/assemble Liberty garments, inspecting Respondents' work product and often speaking directly to them. These communications were not merely to develop "personal contact" or "rapport." They were one-way communications in which Liberty representatives ordered Respondents to make corrections on Liberty's garments and sometimes even instructed them on how to perform their work. On at least one occasion, a Liberty representative actually directed a Respondent and other workers to stop work on another manufacturer's garments and to work instead on Liberty garments, a directive with which they complied.

In sum, Petitioners exerted functional control over Respondents' wages, hours and other terms and conditions of employment.

REASONS FOR DENYING THE PETITION

The 2010 Summary Order and Opinion of the Second Circuit do not conflict with a decision of this Court or of any Court of Appeals nor do they implicate an important question of federal law that has not been, but should be, settled by this Court. Accordingly, Petitioners have not carried their burden of demonstrating any "compelling" reasons for the Petition to be granted. *See* Sup. Ct. R. 10.

I. Whether Determination of the Existence of a Joint Employment Relationship Under the FLSA Should Be Made Exclusively by Consideration of the Four Factors on Which Petitioners Would Rely Was Settled by this Court in *Rutherford Food*.

The FLSA defines employment with "striking breadth." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992). Title 29 U.S.C. § 203(g) provides: "'Employ' includes to suffer or permit to work." This is "the broadest definition [of 'employ'] that has ever been included in any one act." *U.S. v. Rosenwasser*, 323 U.S. 360, 363 n. 3 (1945) (quoting 81 Cong. Rec. 7657 (1937) (statement of Sen. Hugo L. Black).[1] It encompasses "working relationships, which prior to [the FLSA] were not deemed to fall within an employer-employee category." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947); *accord*: *Darden*, 503 U.S., at 526 (§ 203(g) "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles").

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1. Then-Senator Black was the principal sponsor of the so-called Black-Connery bill which became the FLSA.

Petitioners say that, in determining whether they employed Respondents jointly with a contractor within the meaning of the FLSA, the only circumstances which should be considered are whether they had the power to hire and fire Respondents, supervised or controlled their work schedules or conditions of employment, determined their pay rates and method of payment and maintained records of their hours worked and pay. But whether the existence of a joint employment relationship under the FLSA should be determined exclusively by a consideration of those factors (hereinafter "the four factors") was settled in *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947). A meat processing company had engaged a contractor-middleman to hire workers to bone the company's meat. The parties agreed the boners were employed by the contractor but the question was whether they were also employed by the company. This Court explicitly rejected the company's contention that this question could be answered by consideration of limited, individual factors, holding that determination of an employment relationship between the company and the boners depended instead "upon the circumstances of the whole activity." *Id.*, at 730. The Court upheld the Tenth Circuit's finding that the boners were also employees of the company notwithstanding that the contract between the company and the middleman provided that the latter would have "complete control" over the boners "who would be his employees," *id.*, at 725, and notwithstanding that the company did not hire or pay the boners nor directly determine their wages, hours or assignments. The Court's opinion paid no attention to whether the company had maintained records of the boners' hours worked or their pay. *Rutherford Food* effectively answered (in the

negative) the issue Petitioners now raise in the Petition. *See* Pet. App. at 66a, 71a (any contention that joint employment relationship under the FLSA determined exclusively by consideration of the four factors inconsistent with *Rutherford Food*).

The question whether workers hired by an outside contractor to sew/assemble the garments of a manufacturer are employed by the manufacturer, as well as the contractor, for purposes of the FLSA is not the recurrent issue Petitioners imply it is. *Compare* Petition at 17. More than seven years after the Second Circuit's 2003 decision reinstating Respondents' complaint, this remains the only case in which an appellate court has been presented with this issue. And research has uncovered but a single case filed after that 2003 decision, to wit, *Chen v. Cache*, No. 10 Civ. 517 (PKC) (S.D.N.Y.), in which one or more garment workers hired by an outside contractor to sew/assemble a manufacturer's garments brought claims against the manufacturer under the FLSA (or other statute using the same definition of "employ") on the basis of a contention that the manufacturer was also their employer. *Chen* settled shortly after it was filed.

II. The Second Circuit's Rulings on the Joint Employment Issue Are Consistent with *Rutherford Food*.

In its 2003 opinion, the Second Circuit expressly disapproved the lower court's resolution of the first summary judgment motion based exclusively on a consideration of the four factors. (*Id.*, at 54a, 65a-66a, 67a). It reiterated this Court's admonition in *Rutherford Food* that determination of a joint employment relationship is

dependent upon a consideration of all factors which may be relevant to that determination in a given case. *See id.*, at 71a, 81a. In remanding for reconsideration of the issue of joint employment, the Circuit identified various factors it thought the lower court would find "illuminating" in the circumstances of this case and expressly noted these factors were "drawn from *Rutherford*." (*Id.*, at 72a). The District Court's instructions to the jury closely tracked the Circuit's opinion. And the Circuit's 2010 Summary Order upholding the jury's finding of a joint employment relationship (*id.*, at 8a) likewise was consistent with *Rutherford Food*. In short, it is not the Second Circuit's judgment which conflicts with *Rutherford Food* but, rather, the position asserted by Petitioners in the Petition.

III. The Second Circuit's Rulings Are Consistent with the Decisions of Other Courts of Appeals.

Petitioners contend there is a conflict between the Second Circuit and one or more other Circuits regarding the standards for determining the existence of a joint employment relationship under the FLSA. The conflict posited in the Petition is one between the Second Circuit's *2003* decision and a decision of another Circuit. In any event, both the 2003 decision and the 2010 Summary Order are consistent with the decisions of other Circuits.

Petitioners argue the 2003 opinion is at odds with the Ninth Circuit's decision in *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983). But the predicate for that argument, Petitioners' insistence that the Court of Appeals in *Bonnette* held that determination of a joint employment relationship under the FLSA is to be based exclusively upon a consideration of the four

factors, is clearly incorrect. *Bonnette* presented the question whether persons who provided in-home care to disabled public assistance recipients were employed for purposes of FLSA by the recipients alone or also by state and county welfare agencies who were the defendants. The District Court "looked in particular" to the four factors set forth above but at the same time "acknowledg[ed] that its determination must be based on 'a consideration of the total employment situation and the economic realities of the work relationship.'" *Id.*, at 1470 (quoting District Court). In affirming the lower court's finding that the public agencies employed the case workers, the Ninth Circuit squarely rejected the narrow approach urged by Petitioners:

> The four factors considered by the district court provide a useful framework for analysis in this case, *but they are not etched in stone and will not be blindly applied. The ultimate determination must be based "upon the circumstances of the whole activity.*"

Id. (emphasis added), quoting *Rutherford Food.*

Similarly, in *Torres-Lopez v. May*, 111 F.3d 633, 639 (9th Cir. 1997), the Ninth Circuit noted that a court "should consider *all* those factors which are 'relevant to [the] particular situation' in evaluating the 'economic reality' of an alleged joint employment relationship under the FLSA." (Emphasis added, internal citation omitted). The Court held that cucumber pickers were employed under the FLSA and the Migrant and Seasonal Agricultural

Worker Protection Act ("AWPA")[2] by both a farm labor contractor and a grower, despite the fact that the grower-contractor contract provided that it was the contractor who was responsible for supervising the pickers and despite the facts that the grower did not hire or pay the pickers nor directly determine their hours or rates of pay. The Ninth Circuit reached that conclusion without considering whether the grower maintained records of the workers' pay or hours worked.

That the Second Circuit's approach is consistent with the Ninth Circuit's is shown by the Second Circuit's 2003 opinion and, in particular, by the discussion therein of *Carter v. Duchess Community College*, 735 F.2d 8 (2d Cir. 1984). In *Carter*, a district court granted summary judgment dismissing FLSA claims by a prisoner who had performed work for a college. Noting that the defendant had exercised most of the "typical employer prerogatives" encompassed by the four factors discussed in *Bonnette*, *id.*, at 14-15, the Second Circuit reversed the summary judgment and remanded. In the instant case, the Circuit explained its *Carter* opinion:

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2. The term "employ" has the same meaning under the AWPA as under the FLSA. (29 U.S.C. § 1802(5)). Title 29 C.F.R. § 500.20(h)(4)(i), promulgated by the U.S. Department of Labor under the AWPA, provides: "A determination of whether the employment is to be considered joint employment depends upon *all* the facts in the particular case." (Emphasis added). Title 29 C.F.R. § 500.20(h)(4)(ii) provides a *non-exhaustive* list of factors to consider in identifying a joint employment relationship. ("The factors considered significant by the courts in [determining a joint employment relationship] include, but are not limited to, the following...").

> In rejecting the district court's conclusion that they could not be considered employees as a matter of law, we did not purport to identify all factors that could bear on the employer status question. Instead, we stated that the economic reality test "*include[s]*" an inquiry into the four factors."

(Pet. App. at 70a) (emphasis in original). *Carter*, like *Bonnette*, "stands solely for the proposition that" the four factors "can be *sufficient* to establish employer status" and "did not hold...that those factors are *necessary* to establish an employment relationship." (*Id.*, at 71a) (emphasis in original); *see also id.*, at 63a ("[W]e have never suggested that, in analyzing joint employment, the four factors alone are relevant and that other factors that bear on the relationship between workers and potential joint employers should be ignored.").

The District Court was instructed to determine whether Respondents were employed by Petitioners "based on 'the circumstances of the whole activity.'" *Id.*, at 72a, quoting *Rutherford Food*. The Second Circuit identified several factors "drawn from *Rutherford*" which it thought the lower court would find "illuminating" in the circumstances of this case. *Id.*, at 72a-73a. The Court said these factors were "pertinent" but "nonexclusive." *Id.*, at 72a, 81a. On remand, the District Court was "free to consider any other factors it deems relevant to its assessment of the economic realities." *Id.*, at 72a; *accord*: *id.*, at 81a (determination of joint employment relationship must be "based on the totality of the circumstances").

Like the Second and Ninth Circuits, other Circuits have likewise affirmatively held or noted, often on more than one occasion, that *all* factors relevant to an assessment of the economic reality are properly considered when determining the existence of a joint employment relationship under the FLSA. *See, e.g., Antenor v. D & S Farms*, 88 F.3d 925, 932 (11th Cir. 1998); *Aimable v. Long & Scott Farms*, 20 F.3d 434, 439 (11th Cir. 1994); *Hodgson v. Griffin & Brand of McAllen, Inc.*, 471 F.2d 235, 237, 238 (5th Cir. 1973); *Schultz v. Capital Int'l Security, Inc.*, 466 F.3d 298, 306 (4th Cir. 2006); *Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 675, 676 (1st Cir. 1998).[3] And, again like the Second and Ninth Circuits, these Circuits have relied on numerous factors other than or in addition to the four factors in finding an employment relationship or in overturning a judgment rejecting an employment relationship, even where the defendant did not hire or pay workers or directly determine their wages or hours and where the Circuit did not consider whether the defendant maintained records of the workers' wages and hours. *E.g., Antenor*, 88 F.3d, at 927-28, 938; *Griffin & Brand*, 471 F.2d, at 236-37. No Circuit has held that the existence of a joint employment relationship under the FLSA must be determined exclusively by consideration of the four factors on which Petitioners would rely.

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3. Petitioners cite *U.S. Dept. of Labor v. Cole Enterprises, Inc.*, 62 F.3d 775 (6th Cir. 1995). *Cole* involved the question whether an individual was an employer within the meaning of 29 U.S.C. § 203(d), not whether a company employed workers within the meaning of 29 U.S.C. § 203(g). In any event, in answering the question posed in *Cole*, the Sixth Circuit did not hold that a court could consider only the four factors.

In finding or upholding a finding of a joint employment relationship or in holding that a plaintiff was entitled to a trial on a claim dependent on a joint employment relationship, the Circuits have discussed varying configurations of factors. In some cases, courts have held that certain factors alone were sufficient to establish a joint employment relationship under the FLSA or the right to trial on that issue. In such cases, it was unnecessary to consider other factors which might also have been relevant. *E.g.*, *Carter* and *Bonnette*, *supra*. Elsewhere, the number and/or nature of the factors considered in determining the existence of a joint employment relationship turned on the industry involved or on the other particular circumstances in a given case. None of these rulings created a conflict between Circuits as to how to determine the existence of a joint employment relationship under the FLSA. Rather they reflected an unexceptional concern by each of these courts for the particular facts and circumstances which may have been relevant in a given case and/or for the procedural context in which the joint employment issue arose.

IV. Petitioners Failed to Raise in Trial or Post-Trial Proceedings or on Their Appeal to the Second Circuit the Substantive Issue They Now Raise in the Petition.

Although nominally seeking review of the Second Circuit's August, 2010 judgment, the Petition reads as if Petitioners seek review of the judgment of the Court of Appeals on the 2003 appeal. But subsequent to that appeal and to the 2008 denial of Petitioners' second motion for summary judgment (Pet. App. at 20a), a jury trial was held on Respondents' claims and judgment for

Respondents entered on the basis of the jury verdict. In these circumstances, Petitioners may not appeal the 2008 order denying summary judgment nor the 2003 vacatur of the summary judgment dismissing the complaint. *Ortiz v. Jordan*, 131 S. Ct. 884, 888-89 (2011).

As parties which/who were unsuccessful at the summary judgment stage, Petitioners were free to raise at trial any issue pertaining to Respondents' employment by Petitioners. However, as the trial record superseded the record on the summary judgment motions, *id.*, it was incumbent upon Petitioners to create a record in the course of the trial and post-trial proceedings and on their appeal on the issue whether Petitioners' employment of Respondents was to be determined solely on the basis of the four factors, if they wished this Court to consider that issue.

Petitioners repeatedly failed to do so. At no time prior to submission of Respondents' claims to the jury did Petitioners seek a jury instruction to the effect that their employment of Respondents was to be determined exclusively by consideration of the four factors. They neither suggested such an instruction nor objected to the District Court's proposed instructions on the factors which might be considered on the employment issue. To the contrary, Petitioners requested that the jury be charged that it should consider each of the six factors identified by the Second Circuit opinion as "pertinent," *see* Pet. App. at 72a-73a, and that it could consider three additional factors. Petitioners also requested the following charge:

> You should make this decision [whether Respondents were employed by Petitioners]

> by looking at the totality of the circumstances weighing in favor or against a finding of joint employment. In doing so you should consider the six factors listed above, the factors proposed by the parties, if you find them to be relevant, and any other factors you find to be relevant.[4]

While Petitioners made a motion prior to submission of the case to the jury for judgment as a matter of law, they did not argue that the sufficiency of the evidence on joint employment should be measured exclusively by consideration of the four factors. They thereby failed to comply with Fed. R. Civ. P. 50(a) which, by its terms, provides that such a motion "*must specify* the judgment sought and the law and facts that entitle the movant to the judgment." (Emphasis added). *See also Lambert v. Genesee Hosp.*, 10 F.3d 46, 53-54 (2d Cir. 1993) ("the specificity requirement is obligatory"). Similarly, in their post-verdict motion pursuant to Fed. R. Civ. P. 50(b) and 59, Petitioners failed to argue for JMOL or a new trial on the basis that Respondents had introduced insufficient evidence of joint employment if measure exclusively by the four factors or that the District Court had failed to instruct the jury that the existence of a joint employment relationship should have been determined solely on the basis of the four factors.[5] In these circumstances,

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4. A verdict form proposed by Petitioners would have had interrogatories submitted to the jury on the presence or absence of each of the six factors identified by the Second Circuit as "pertinent" and on the weight to be ascribed to each of those factors.

5. Petitioners' failure to properly raise this issue on their Rule 50(a) motion for JMOL would have prevented them from obtaining

Petitioners were foreclosed from arguing on appeal that they were entitled to JMOL due to lack of sufficient evidence of a joint employment relationship when measured exclusively by the four factors or to a new trial on the ground that the judgment entered in the wake of the jury verdict was improperly infected by consideration of factors other than or in addition to the four factors. *See Unitherm Food Systems, Inc. v. Swift-Eckrich*, 546 U.S. 394, 404 (2006).

In any event, Petitioners did not make either of these arguments on their appeal, and the Second Circuit panel did not address them. After affirmance by the panel in August, 2010 of those parts of the judgment concerning the FLSA claims, Petitioners filed a petition for rehearing/rehearing *en banc*. However, they did not raise any argument to the effect that the District Court had erred in upholding the FLSA components of the judgment because those components were based on a finding of a joint employment relationship which was not made exclusively by consideration of the four factors.

In sum, the substantive issue set forth in the Petition is a free-floating question untethered to a motion or objection properly made at trial or in post-trial proceedings or to a contention advanced on Petitioners' appeal to the Second Circuit. Because, following the 2008 denial of summary judgment, Petitioners repeatedly failed to raise in the lower courts, and those courts did not consider, the

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a post-verdict JMOL even had they moved under Rule 50(b) for JMOL on this ground. *E.g.*, *Doctor's Assocs., Inc. v. Weible*, 92 F.3d 108, 112 (2d Cir. 1996) (Rule 50(b) normally proscribes a post-verdict JMOL "on any ground not specifically raised in an earlier motion" under Rule 50(a)).

issue now presented in the Petition, that issue was not properly preserved for review by this Court. *See Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) ("this is a court of final review and not first view") (internal quotation marks omitted); *City of Springfield v. Kibbe*, 480 U.S. 257 (1987) (writ dismissed as improvidently granted where petitioner did not object to jury instruction concerning issue presented in petition and did not present that issue to Court of Appeals).

V. This Court's Precedents Have Settled Whether the District Court Was Compelled to Decide Itself Whether Respondents Were Employed by Petitioners.

Respondents had a right to trial by jury of their claims under the FLSA, *Lorillard v. Pons*, 434 U.S. 575, 580 (1978), and Respondents properly exercised that right by timely making a demand for same. Respondents' employment by Petitioners was a necessary element of their FLSA claims under 29 U.S.C. §§ 206(a)(1) and 207(a)(1). *Cf.*, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006) (defendant's status as employer within meaning of Title VII necessary "element" of plaintiff's claim for relief). Thus, Petitioners were entitled to a jury trial on the issue of the existence of a joint employment relationship with each Petitioner.

In the District Court, Petitioners proposed resolving that issue by dividing it between the jury and the Court. Several factual questions as to the presence or absence of individual factors bearing upon the existence of a joint employment relationship and as to the weight to be ascribed to each of those factors would be submitted

to the jury. But after the jury answered each of those interrogatories, the Court, on the basis of the jury's answers thereto, would itself decide whether Respondents were employed by one or more of the Petitioners. *See* Pet. App. at 18a.

The Court rejected that approach. It submitted to the jury the determination of the issue whether Respondents were employed by each defendant within the meaning of the FLSA, by directing the jury to answer a single interrogatory: "Do you find that one or more of the defendants had functional control over the terms and conditions of employment?" The jury was directed to answer the interrogatory "Yes" or "No" for each defendant separately. The jury found Petitioners were employers of Respondents and that the third defendant, Laniado, was not. Petitioners claim this was error, that the Court was compelled to divide the issue between jury and Court as Petitioners had proposed, assigning to itself the "ultimate" question whether Respondents were employed by Petitioners.

Whether the District Court erred in submitting to the jury the issue whether Respondents were employed by Petitioners effectively has been settled by this Court. This issue clearly was a mixed question of law and fact, that is, it required determination of a set of facts followed by the application of a legal standard to the facts found. In *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964), this Court held that "whether Greyhound possessed sufficient indicia of control to be an employer [under the National Labor Relations Act] is essentially a factual issue." And by proposing that determination of the issue whether Respondents were employed by Petitioners be split

between the jury and the Court, Petitioners effectively conceded that the issue was comprised of both factual and legal components.

This Court has held that mixed questions of law and fact "are peculiarly ones for the trier of fact." *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976). It explained why this is so in terms which directly refute Petitioners' proposal to divide the issue of employment between jury and court. "We must bear in mind that the underlying objective facts, which will often be free from dispute, are merely the starting point for the ultimate determination..." *Id.* The ultimate determination "requires delicate assessments of the inferences a 'reasonable [decisionmaker]' would draw from a given set of facts and the significance of those inferences to him, and these assessments are peculiarly ones for the trier of fact." *Id.* (footnote omitted). Accordingly, a mixed question of law and fact "has typically been resolved by juries." *U.S. v. Gaudin*, 515 U.S. 506, 512 (1995).

Thus the procedural question posed in the Petition has already been effectively resolved by this Court.

VI. The Second Circuit's Opinion Upholding Submission to the Jury of the Issue Whether Respondents Were Employed by Petitioners was Fully Consistent with the Decisions of this Court.

The Second Circuit observed, no doubt correctly in view of *Greyhound*, that whether Respondents were employed by Petitioners involved both determinations of facts and application of a legal standard to the factual determinations. *See* Pet. App. at 17a-18a. In upholding

submission to the jury of this mixed question of law and fact, the Second Circuit noted that "appellate courts rarely --if ever-- vacate for failure to use a special verdict form." (*Id.*, at 18a). *See also* 9B C. Wright & A. Miller, Federal Practice & Procedure § 2505 (3d ed. 2008) at 109-110 ("there appears never to have been a reversal on this ground"). Fed. R. Civ. P. 49(a) gives a district court ample, if not unreviewable, discretion not to require a jury to answer numerous interrogatories. Splitting determination of the existence of a joint employment relationship between the jury and the Court would have required a separating out of the interwoven elements of fact and law the difficulty of which would risk abridgment of Respondents' right to trial by jury. (Pet. App. at 19a). The record here provided no basis for departure from the "typical" resolution by a jury of a mixed question of law and fact. The Circuit's upholding of submission to the jury of the issue whether Respondents were employed by Petitioners was fully consistent with *Greyhound*, *TSC Industries* and *Gaudin*.

VII. There Is No Conflict Between the Second Circuit's Opinion and the Decisions Cited by Petitioners.

Petitioners contend the Second Circuit's affirmance of the District Court's submission to the jury of determination of the existence of a joint employment relationship conflicts with the decisions in *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983), and *Johnson v. United Gov't of Wyandotte County*, 371 F.3d 723 (10th Cir. 2004). This contention is founded on a misreading of those cases.

In *Castillo*, a district court entered judgment for a defendant on claims under the FLSA based on the jury's

answers to nine special interrogatories. The plaintiffs appealed from the court's denial of their motion under Fed. R. Civ. P. 50(b) for judgment n.o.v. (now JMOL). 704 F.2d, at 183. The sole issue was whether the facts showed the plaintiffs were employees of the defendant. The Fifth Circuit held that because there were no unresolved issues of fact, the employment relationship "was established as a matter of law." *Id.*, at 187-88. In *Johnson*, the Tenth Circuit held only that where a jury had found the defendant did not employ the plaintiffs, it would review the denial of the plaintiffs' post-trial motion for JMOL only for sufficiency of the evidence and not *de novo*. 371 F.3d, at 728-29. *Castillo* and *Johnson* are thus plainly distinguishable. In neither did a Court of Appeals hold that a district court erred in submitting to a jury the issue of a plaintiff's employment by a defendant where, as in the present case, the evidence introduced at trial was sufficient for submission to the trier-of-fact. We also note that, in attempting to create a conflict between the Second and Tenth Circuits, Petitioners ignore *Bristol v. Bd. of County Comm'rs*, 312 F.3d 1213, 1221 (10th Cir. 2002) (*en banc*), where the Tenth Circuit held that, as a matter of law, the defendant board was not the plaintiff's employer but reaffirmed the "general rule" that "'determining whether an entity qualifies as an employer is a fact issue for the jury.'" (Internal citation omitted).

CONCLUSION

Petitioners have not established any compelling reasons for the Court to grant the Petition. Accordingly, Respondents request that the Petition be denied.

Respectfully submitted,

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